

Chapter 5
Availability of Appropriations: Time

7. Contract Modifications and Amendments Affecting Price

Contract performance may extend over several years. During this time, the contract may be modified or amended for a variety of reasons at the instigation of either party. An amendment within the general scope of the contract which does not increase the contract price remains an obligation of the year in which the contract was executed. B-68707, August 19, 1947. If the modification results in an increase in contract price and the appropriation charged with the original contract has expired for obligation purposes, the question from the bona fide needs perspective is which fiscal year to charge with the modification.

If the modification exceeds the general scope of the original contract, for example, by increasing the quantity of items to be delivered, the modification amounts to a new obligation and is chargeable to funds current at the time the modification is made. 37 Comp. Gen. 861 (1958); B-207433, September 16, 1983.

In the case of a contract for services which are severable, a modification providing for increased services must be charged to the fiscal year or years in which the services are rendered, applying the principles discussed in Section B.5. 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, B-202222, August 2, 1983; B-224702, August 5, 1987. In 61 Comp. Gen. 184, for example, a contract to provide facilities and staff to operate a project camp was modified in the last month of FY 1980. The modification called for work to be performed in FY 1981. Regardless of whether the contract was viewed as a service contract or a contract to provide facilities, the modification did not meet a bona fide need of FY 1980. The modification amounted to a separate contract and could be charged only to FY 1981 funds, notwithstanding that it purported to modify a contract properly chargeable to FY 1980 funds.

For modifications within the general scope of the original contract, the situation is a bit more complicated. Most government contracts contain provisions which, under certain conditions, render the government liable to make equitable adjustments in the contract price. Such liability may arise due to changes in specifications, government-caused delay, changed conditions, increased overhead rates, etc. These conditions are set out in standard contract clauses such as the "Changes" clause, "Government Property" clause, or "Negotiated Overhead Rates" clause.

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Because there is no way to know whether the government will actually incur liability under these provisions, and if so, the amount of such liability, until the occurrence of the specified conditions (cf. 50 Comp. Gen. 589, 591 (1971)), the appropriations charged with the cost of the contract are not firmly obligated to cover future price increases which arise due to the operation of these clauses. Nevertheless, as noted, government contracts frequently contemplate that performance will extend into subsequent fiscal years. When an upward price adjustment is necessitated in a subsequent year, the general approach is to ask whether the adjustment is attributable to "antecedent liability"—that is, whether it arises and is enforceable under a provision in the original contract. If the answer to this question is yes, then a within-scope price adjustment which is requested and approved in a subsequent fiscal year, for example, under the "Changes" clause, will—with one important qualification to be noted later—be charged against the appropriation current at the time the contract was originally executed. Cases supporting this proposition in various contexts are 59 Comp. Gen. 518 (1980); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938); A-15225, September 24, 1926; B-146285-O.M., September 28, 1976.¹² See also B-197344, August 21, 1980, where supplemental work was done without issuance of a formal contract modification. This principle is occasionally referred to as the doctrine of "relation back." E.g., 37 Comp. Gen. 861, 863 (1958).

The reasoning is that a change order does not give rise to a new liability, but instead, only renders fixed and certain the amount of the government's pre-existing liability to adjust the contract price. Since that liability arises at the time the original contract is executed, the subsequent price adjustment is viewed as reflecting a bona fide need of the same year in which funds were obligated for payment of the original contract price. The concept was stated as follows in 23 Comp. Gen. 943, 945 (1944):

"It is true that at the time the contract was executed it was not known that there would, in fact, be any changes ordered . . . for which the contractor would be entitled to be paid an amount in addition to amounts otherwise payable under the contract. Also, it is true that [the Changes clause] contemplates the execution of amendments to the contract from time to time covering such changes. However, the fact remains that the obligations and liabilities of the

¹²Similarly, costs incurred under a termination for convenience are chargeable to the appropriation originally obligated for the contract. B-203074, August 6, 1981.

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parties respecting such changes are fixed by the terms of the original contract, and the various amendments merely render definite and liquidated the extent of the Government's liability in connection with such changes."

In order to avoid over-obligating the original appropriation, the contracting officer must estimate the expected net additional obligations to insure that available appropriations are not committed to other purposes. E.g., 61 Comp. Gen. 609, 612 (1982); B-192036, September 11, 1978. It is also true, however, that estimated liabilities of this type require constant review to insure that appropriations do not remain encumbered in excess of the amounts which will actually be needed to meet the total liability under the contract.

For contracts spanning lengthy periods of time, funding of within-scope modifications involves the use of expired appropriations. As discussed later in this chapter, the balances in expired accounts prior to closing are available without further congressional action. Thus, within-scope modifications can result in significant cost escalation with minimal congressional oversight.

Not all price adjustments arising from contract modifications or amendments represent a bona fide need of the year in which the agreement was made. If, as noted above, the change or amendment exceeds the general scope of the contract, or is not made pursuant to a provision in the original contract, then it is not based on any antecedent liability, in which event it may obligate only appropriations current at the time it is issued. 56 Comp. Gen. 414 (1977). See also 25 Comp. Gen. 332 (1945) (purported change order issued after completion of contract, covering work contractor was not legally bound to do under original contract, amounted to new contract).

As noted above, there is an important exception or qualification to the antecedent liability rule. In cost reimbursement contracts, discretionary cost increases (i.e., increases which are not enforceable by the contractor) which exceed funding ceilings established by the contract may be charged to funds currently available when the discretionary increase is granted by the contracting officer. 61 Comp. Gen. 609 (1982). It would be unreasonable, the decision pointed out, to require the contracting officer to reserve funds in anticipation of increases beyond the contract's ceiling. Id. at 612. Changes which do not exceed the stipulated ceiling continue to be chargeable to

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funds available when the contract was originally made (*id.* at 611), as do amounts for final overhead in excess of the ceiling where the contractor has an enforceable right to those amounts (*id.* at 612). Since prior decisions such as 59 Comp. Gen. 518 had not drawn the below-ceiling/above-ceiling distinction, 61 Comp. Gen. 609 modified them to that extent. A more recent case applying 61 Comp. Gen. 609 is 65 Comp. Gen. 741 (1986).

Once an account has been closed (generally five fiscal years after the expiration of obligational availability), questions of antecedent liability or relation back are no longer relevant since account balances upon closing cease to be available for any purpose and only current funds may be used, up to specified limits, for such obligations. 31 U.S.C. §§ 1552 and 1553, as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1485, 1676 (1990).

For contract changes which would require the contractor to perform additional work, as opposed to increases under an escalation clause or to pay claims, the use of expired fixed-year appropriations is subject to two approval requirements. If a proposed contract change chargeable to an expired account would cause a cumulative increase of more than \$4 million during a fiscal year for contract changes for the relevant program, project, or activity, the obligation must be approved by the agency head or by an official within the agency head's immediate office to whom the authority has been delegated. If the cumulative increase would exceed \$25 million, the agency head must report the proposed obligation to the relevant authorizing committees and the appropriations committees of the Senate and House of Representatives, and must defer making the obligation for 30 days after submitting the report. 31 U.S.C. § 1553(c), as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. at 1677 (1990).

8. Multi-Year Contracts

Any discussion of multi-year contracting must inevitably combine the *bona fide* needs rule with material from Chapter 6 on the Antideficiency Act and from Chapter 7 on obligations.

The term "multi-year contract" has been used in a variety of situations to describe a variety of contracts touching more than one fiscal year. To prevent confusion, we think it is important to start by establishing a working definition. A multi-year contract, as we will use the term in this discussion, is a contract covering the